Supreme Court of the United States

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
Petitioner,

vs.

SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

JACK HART
MYRON ENGELMAN
10 East 40th Street
New York 16, N. Y.
Counsel for Petitioner
New Hampshire Fire
Insurance Co.

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CASES CITED

Opinions Below

The opinion of the Court of Appeals (R. 17) is reported at 267 F. 2d 941. The opinion of the District Court (R. 14) is reported at 172 F. Supp. 392.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1959 (R. 17). The petition for certiorari was filed on August 22, 1959 and was granted on November 9, 1959. The jurisdiction of this Court is invoked and rests on 28 U. S. C. § 1254(1).

Question Presented

> Do the United States District Courts have jurisdiction under 28 U. S. C. § 2463 to determine, in a summary proceeding instituted by order to show cause and petition, the rights to property improperly detained under the alleged authority of the revenue laws.

The statute involved is 28 U. S. C. § 2463, which provides:

> "§ 2463. Property taken under revenue law not repleviable.
>
> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Statement of the Case

The petition (R. 4-9) alleges that a construction contract was entered into between Acme Cassa, Inc., a contractor, and the City of New York. A condition to the making of the contract was the furnishing of performance and payment surety bonds by the contractor. The petitioner, New Hampshire Fire Insurance Company, as surety, executed these bonds, on behalf of Acme Cassa, Inc., as principal, in favor of the City of New York, as obligee.

After commencement of performance of the contract, Acme Cassa, Inc. became financially unable to continue performance or to pay its subcontractors and suppliers of labor and material. Petitioner, as surety, financed completion of the contract and made payments to unpaid subcontractors, laborers and suppliers. As of November 25, 1958 these payments totalled $82,990.17.

Since January 7, 1958, the City of New York has had available for delivery to petitioner a warrant in the amount of $68,015.50. Another warrant for the final contract payment in the amount of $35,936.80 will be issued by the City of New York in the future.* The available warrant has not been delivered to petitioner because of certain notices of lien and notices of levy served upon the City of New York by Respondent Scanlon, District Director of Internal Revenue. These notices of liens and levies arise out of unpaid taxes, totalling $39,004.67 as of January 21, 1959, claimed to be due from the contractor, Acme Cassa, Inc. Respondent Scanlon consented to the payment to the surety of $28,515.50 from the $68,015.50 warrant.

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*$36,132.93 was issued and delivered to petitioner with consent of Respondent on October 7, 1959, after the filing of the petition.

In its petition to the District Court the petitioner herein claimed (1) that under the law of the State of New York, it is subrogated to the rights of the City of New York, its obligee, to the unpaid contract balance and that, as subrogee, it is entitled to the contract balance in question against any claims of the Government based on unpaid taxes of its principal; and (2) that 28 U. S. C. § 2463 places its property which has been improperly detained by the District Director of Internal Revenue "in the custody of the law" and that the District Court must render an appropriate order or decree relating to the disposition of the property.

Upon the petition the District Court issued an order directing respondents Scanlon, the City of New York and Acme Cassa, Inc. to show cause why the above mentioned notices of levy should not be quashed (R. 2). Only Respondent Scanlon appeared in opposition to the petition.

The District Court, relying upon *In re Behrens*, 39 F. 2d 561 (2d Cir. 1930) and *Goldman v. American Dealer's Service*, 135 F. 2d 398 (2d Cir. 1943), dismissed the petition, holding that the District Court had no jurisdiction in a summary proceeding to adjudicate rights to the property even though the property was placed by statute in the custody of the law. The applicability of Section 2463 was not in question, the District Court saying: "*** I will assume that the funds have been detained within the meaning of Section 2463 (cf. *Seattle Association of Credit Men v. U. S.* (9 Cir. 1957) 240 F. 2d 906)".

The Court of Appeals for the Second Circuit affirmed, in a per curiam opinion reading as follows:

> "Upon the opinion of Judge Cashin, D. C. S. D. N. Y., April 16, 1959 [172] F. Supp. [392], the order is affirmed."

ARGUMENT

The United States District Courts Have Jurisdiction under 28 U. S. C. § 2463 to Determine in a Summary Proceeding the Rights to Property Improperly Detained under the Alleged Authority of the Revenue Laws.

The sole question presented to this Court is whether a party, whose property has been improperly detained under the purported authority of the revenue laws of the United States to satisfy the tax liability of another, may have his claim to the property adjudicated in a summary proceeding.

Petitioner does not complain of action by the United States, but of action by Respondent Scanlon in his personal capacity. In short, petitioner alleges that it is not a delinquent taxpayer and that Scanlon plainly is acting outside the scope of his authority in seizing petitioner's property to satisfy the tax liability of another; that the seizure, therefore, constitutes a trespass which, in the absence of Section 2463, could be speedily redressed in a state court; and that Section 2463, while ousting the state courts of jurisdiction, places the seized property "in the custody of the law" so that the Federal court may summarily remedy the wrong inflicted upon the injured petitioner.*

The differences between summary proceedings and plenary suits have been set forth in *Central Republic Bank and Trust Co. v. Caldwell*, 58 F. 2d 721, 731-32 (8th Cir. 1932):

> "The main characteristic differences between a summary proceeding and a plenary suit are: The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal pleadings. In the former, the necessary parties are cited in by

*The interesting history of Section 2463, first enacted in 1833 to meet the problems created by South Carolina's Ordinance of Nullification appears in IX Gale & Seaton, Register of Debates in Congress 244 *et seq.* (1833).

> order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had.
>
> It is apparent that the differences are largely procedural rather than substantive."

Due process, of course, must be satisfied by proper notice to the parties with opportunity to answer and be heard. Petitioner does not contend that Scanlon should not be afforded an opportunity to dispute petitioner's claim on the facts and the law.

That Respondent Scanlon's actions in serving the notices of liens and levies constituted a detention within the meaning of 28 U. S. C. § 2463 is not open to serious question. It was "assumed" by the District Court (R. 15) and Scanlon did not contend to the contrary.*, In addition to *Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906 (9th Cir. 1957), cited in the District Court's opinion, the Third and Fourth Circuits appear to be in accord that the service of a notice of levy effects a "detention" within the meaning of Section 2463. *Raffaele* v. *Granger*, 196 F. 2d 620 (3d Cir. 1952); *United States* v. *Eiland*, 223 F. 2d 118 (4th Cir. 1955).

*Similarly the allegations of the petition concerning New Hampshire's claim that it is subrogated to the rights of the City have not been questioned. Under New York law, it is clear that a completing surety which pays laborers and material men to complete a contract is entitled, as subrogee, to any unpaid contract balance as against any claims of the government based on unpaid taxes of the principal. *Massachusetts Bonding & Insurance Company* v. *N. Y.*, 259 F. 2d 33 (2d Cir. 1958); *Fidelity & Deposit Company* v. *N. Y. City Housing Authority*, 241 F. 2d 142 (2d Cir. 1957); *Aetna Casualty Co.* v. *U. S.*, 4 N. Y. 2d 639 (1958); *Fidelity & Guaranty Company* v. *Triborough Bridge Authority*, 297 N. Y. 31 (1957).

CASES IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

The problem presented to this Court arose before the Court of Appeals for the Third Circuit in *Raffaele v. Granger*, 196 F. 2d 620 (1952). In that case a levy was made on bank accounts standing in the name of a delinquent taxpayer and his innocent wife. A petition by the spouses praying that the warrants of distraint be quashed was granted. The petition was based on the Pennsylvania law which made the interests of the spouses in the accounts inseparable so that the effect of the Collector's action was to take the property of the wife to satisfy the liability of the husband.

The Court of Appeals, after pointing out that the United States has no power to take property from one person to satisfy the tax liability of another, rejected the Collector's contention that a plenary action was needed.

The Court stated at page 623:

> "Distraint is a summary, extra judicial remedy having its origin in the Common Law. There, a form of self help, it consisted of seizure and holding of personal property by individual action without intervention of legal process for the purpose of compelling payment of debt. Relief of one aggrieved by the levy of distraint, at common law, was by an action of replevin against the distrainor. Pollock & Maitland, History of the English Law, Vol. II, page 577. In our time, distraint, together with a power of sale, has been made available to the Collector of Internal Revenue as a sanction for securing payment of taxes which persons liable have refused or neglected to pay. But property taken or detained under any revenue law, unlike property seized at common law, is not repleviable. By Section 2463 of Title 28 of the United States Code, however, it is 'deemed to be in the custody of the law' and is subject to the 'orders

> and decrees of the courts of the United States having jurisdiction thereof.' * * * Moreover, a plenary civil suit is not necessary to enable a court to exercise jurisdiction over property thus *in custodia legis*. * * * Once due process has been satisfied by notice to the interest parties and opportunity to be heard, the court may proceed summarily to adjudicate the rightfulness of seizure. Cf. In re Behrens supra, Gilliam v. Parker, supra."

In addition to *Raffaele*, the Court of Appeals for the Third Circuit, in two other cases, has relied on Section 2463 as a basis for granting summary relief to one whose property has been seized to pay the taxes of another. *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178, 180 (1956) and *Rothensies* v. *Ullman*, 110 F. 2d 590 (1940).

CASES IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The district court's opinion in the instant case, which was adopted by the Court of Appeals, based its decision that the court was without summary jurisdiction on two Second Circuit cases: *In Re Behrens*, 39 F. 2d 561 (2d Cir. 1930) and *Goldman* v. *American Dealer's Service*, 135 F. 2d 398 (2d Cir. 1943). We submit that both of these cases confirm and do not deny the summary jurisdiction of the District Court. Each case acknowledges the summary jurisdiction and deals only with the discretion exercised by the District Court in a pending summary proceeding.

In *United States* v. *Green*, 40 F. 2d 593 (2d Cir. 1930), the Second Circuit Court of Appeals defined its holding in the *Behrens* case as follows:

> "In Matter of Behrens, supra, we held that, when forfeitable property is seized and held by prohibition officers, the legality of their seizure was to

> be determined in the forfeiture proceedings, not on summary motion for an order directing return of the property." (page 598)

In *Behrens*, however, the Court of Appeals, considering the applicability of Section 2463, concluded "* * * that the District Court has jurisdiction to direct the officer who detains the seized property as to its disposition" (page 563). The Court then held that "* * * the owner's proper and orderly procedure is to determine this question upon proceedings for forfeiture" (page 563). Finally, the Court said at page 564:

> "Our conclusion is that, upon the appellant's petition, the court should not have passed upon the legality of the seizure, but should have directed the prohibition administrator, assuming he was served with the show cause order or voluntarily appeared, either to institute proceedings promptly (and we should suppose ten days would be sufficient time) or to abandon the seizure and return the property."

It is evident, we believe, that in *Behrens*, the Court of Appeals assumed the existence of the power of the District Court to exercise summary jurisdiction over the seized property but held that in the interest of "proper and orderly procedure", the order that should have been made by the District Court, pursuant to the provisions of Section 2463, was to direct the forfeiture proceedings to be instituted in ten days or to require the return of the property. Such an order involved the discretion of the District Court, not its power, for obviously, in order to direct the return of the seized property, even in the alternative (if a forfeiture proceeding were not instituted), the District Court needed to have the power to make such an order in the summary proceeding pending before it.

Similarly in *Goldman*, the District Court in a summary proceeding directed the return of the seized property

"* * * unless within ten days from the service of this order * * * forfeiture proceedings or other proceedings to test the validity of the seizure are commenced, in which event the motion is denied". (page 399). The Court of Appeals affirmed, saying:

> "Consequently, for purposes of construing the statute, we are required to assume that appellants, government officials, without a shadow of lawful authority, have seized a citizen's property. Officials, when they thus behave, are stripped of their official character; what they do is the mere wrong and trespass of those individual persons who falsely speak and act in the name of the government; an official, who has acted in that manner, 'ceased to be an officer of the law, and became a private wrong-doer'; 'though professing to act as officers,' appellants were, on the assumed facts now before us, 'individual trespassers guilty of a wrong in taking the property' of appellee 'illegally'." (page 400)
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> * * * * *
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> "We therefore interpret 39 U. S. C. A. § 498, taken together with 28 U. S. C. A. § 747, [§ 2463] as meaning that the seized property may be held for two months after termination of proceedings begun by the government; that such proceedings must be brought not later than six months after the seizure; but that, under 28 U. S. C. A. § 747, [§ 2463] the court may direct that the property be returned unless the government brings such proceedings with reasonable promptness short of the full six months; what is reasonable promptness will, of course, depend on the particular facts; there might be situations in which a delay for six months would be reasonable; that would be particularly true where the citizen admitted (what appellee does not admit) that the property had been lawfully taken. Under the statutes thus interpreted, the order of the trial judge was proper. Appellants made not the slightest showing and in fact did not suggest that any injury

> or inconvenience would result to the government from instituting a prosecution six weeks and more after the seizure; on the other hand, the retention of the checks might impair or even destroy appellees' business, and the possible loss of the cash discounts appeared not unlikely to cause serious loss. Accordingly, the trial court did not abuse its discretion. In re Behrens, 2 Cir., 39 F. 2d 561. How much showing citizens must make in every such case we need not here decide; but when the court is required, as here, to assume illegality in the seizure, it would seem that too much of a burden should not be put on the citizen." (page 401-2)

In summary, we have been unable to find any case either in the Second Circuit or any other Circuit which has not recognized the summary jurisdiction of the District Court where Section 2463 was applicable and the property was in the custody of the law. Our contention is merely that the District Court must recognize its summary jurisdiction and cannot dismiss for lack of jurisdiction. The manner in which it exercises its jurisdiction with respect to the merits of a particular case, is, of course, another matter and not involved in the question here presented.

Finally, it may be noted that it has been uniformly held that a court has summary jurisdiction over property in its custody. *GoBart Importing Co.* v. *United States*, 282 U. S. 344 (1931) (Improperly seized evidence); *Krippendorf* v. *Hyde*, 110 U. S. 276 (1884) (Improperly attached property); *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426 (1924) (Property of a bankrupt).

CONCLUSION

Petitioner's petition asserts that its property has been improperly detained under the purported authority of a revenue law of the United States. Under 28 U. S. C. § 2463

property so detained is placed in the custody of the law and made subject to the District Court's orders and decrees. The District Court has thus been invested with the authority to deal with such improperly seized or detained property in a summary proceeding. The order appealed from should be reversed and this matter remanded to the District Court so that appropriate proceedings may be held and petitioner's claim adjudicated.

Respectfully submitted.

JACK HART,
MYRON ENGELMAN,
Counsel for Petitioner
10 East 40th Street
New York 16, N. Y.